

Before the  
Administrative Hearing Commission  
State of Missouri



EL VOLCAN LLC and  
RAMONA E. GALINDO,

Petitioners,

vs.

DIRECTOR OF REVENUE,

Respondent.

No. 14-1390 RS

**DECISION**

We dismiss the complaint filed by El Volcan LLC (“El Volcan”) and Ramona E. Galindo (“Galindo”) because we lack jurisdiction.

**Procedure**

On August 20, 2014, this Commission received, from the General Counsel’s office of the Director of Revenue (“the Director”), several documents that we accepted as a complaint from El Volcan and Galindo. These documents (“the Complaint Documents”) are:

- a letter dated August 11, 2014 from Galindo to the Director’s Taxation Division, stating that “[her] appeal from the assessment and final decision of [the Director]” was enclosed;
- a letter from attorney Roger O. Reyes to the Taxation Division dated August 15, 2014, referencing the Director’s lien number 201418205000026, informing the Division that El Volcan was “appealing the assessments carried out by your office for the years 2008 through 2013,” and asking that the lien be withdrawn pending the outcome of the appeal;

- a complaint, styled El Volcan LLC and Galindo c/o Roger O. Reyes v. Missouri Department of Revenue Taxation Division, signed by Galindo, which appeals the assessments of unpaid sales/use tax for 2009-2013. Two sets of attachments, labeled Tabs 1 and 2, were referenced in the complaint; and
- the documents grouped under Tabs 1 and 2. Those under Tab 1 were, primarily, copies of the Director's assessments against, separately, El Volcan and Galindo, while those under Tab 2 constituted, according to the complaint, a report of Heartland Payment Systems that, according to the complaint, "indicat[ed] the true amount of credit payment."<sup>1</sup>

There were multiple copies of the first three documents in the Complaint Documents, as well as two fax cover sheets from Reyes' office. We received the Complaint Documents, denominated them collectively as a complaint, and opened the case.

On September 19, 2014, the Director filed his answer, and on September 30, 2014, the Director filed a motion for involuntary dismissal of the complaint supported by an affidavit and copies of the Director's records. We treat the motion as a motion for summary decision because it relies on matters other than allegations in the complaint and stipulations. Regulation 1 CSR 15-3.436(4)(A).<sup>2</sup> We will grant the motion if the Director establishes facts that entitle her to a favorable decision and El Volcan does not dispute those facts. Regulation 1 CSR 15-446(6)(A).

A response on behalf of El Volcan was filed on October 15, 2014. To establish facts, parties may rely on pleadings of the adverse party, affidavits, and other evidence admissible under the law. Regulation 1 CSR 15-3.446(6)(B). Based on examination of the pleadings and other evidence, we find the following facts to be undisputed.

### **Findings of Fact**

#### Assessments of Unpaid Tax

1. On June 20, 2014, the Director issued assessments of unpaid sales tax against El Volcan based upon the audit of El Volcan for tax periods January 1, 2009 through December 31,

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<sup>1</sup> While some of the documents were obviously faxed from Reyes' office and some bore fax stamps showing dates and times, we make no finding as to when they were received by the Department of Revenue.

<sup>2</sup> All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

2013. The total assessed amount of sales tax, additions, and statutory interest was \$200,826.83. On the same date, the Director issued the same assessments of unpaid sales tax, additions and statutory interest against Galindo, a member of the limited liability company (El Volcan), who the Director determined was liable for its tax obligations<sup>3</sup>

2. The above-referenced assessments were sent by certified mail to El Volcan and Galindo on June 20, 2014.

3. Each assessment stated that, in order to appeal the assessment, a petition had to be filed with this Commission at its address of P.O. Box 1557, Jefferson City, Missouri 65102 no later than 60 days from the date of mailing or receipt of the assessment.

4. On August 20, 2014, the Director delivered the Complaint Documents to this Commission. We deemed the filing to be the complaint and deemed it filed with us on this date.

#### Deficiency of Withholding Tax

5. On June 26, 2014, the Director mailed notices of deficiency of withholding tax to El Volcan, each of which stated the right of El Volcan to file a written protest with the Director within 60 days of the date of the notice.

6. El Volcan has not filed a written protest with the Director, and the Director has not yet issued a final decision concerning the notices of deficiency.

#### **Conclusions of Law**

#### Assessments of Unpaid Tax

Section 621.050.1<sup>4</sup> gives us jurisdiction over an appeal of “any finding, order, decision, assessment or additional assessment made by the director of revenue.” Final decisions of the Director regarding sales or use tax may be appealed *to the Commission* so long as the appeal is

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<sup>3</sup> We infer from the simultaneously issued assessments that Galindo was a member of El Volcan, and that El Volcan had elected to be taxed as a partnership.

<sup>4</sup>Statutory references, unless otherwise noted, are to RSMo 2000.

filed within sixty days after the mailing or delivery of the decisions, whichever is earlier.

Section 144.261. The 60-day period begins on the date the decision was mailed. *R.B. Indus. v. Goldberg*, 601 S.W.2d 5, 7 (Mo. banc 1980). Section 621.205.1 provides:

For purposes of determining whether documents are filed within the time allowed by law, documents transmitted to the administrative hearing commission by registered mail or certified mail shall be deemed filed with the administrative hearing commission as of the date shown on the United States post office records of such registration or certification and mailing.

“Transmit” means “to send or convey from one person or place to another : FORWARD[.]” MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1329 (11th ed. 2004). Petitioners did not transmit the complaint to this Commission; they transmitted the complaint by certified mail to the Director's Taxation Division. This Commission is a neutral, independent agency that is separate from the Department of Revenue. Although we encourage agencies to forward documents that should have been sent to us, they are under no legal duty to do so. Because the complaint was not transmitted to us (as required by law and as each assessment directed the Petitioners to do) , it was not filed until we received it on August 20, 2014. The 60th day after June 20, 2014, was August 19, 2014, and was therefore not timely.

As a legislative creation, this Commission has only such jurisdiction as is conferred upon it by statute. *State Bd. of Regis'n for the Healing Arts v. Masters*, 512 S.W.2d 150, 161 (Mo. App., K.C.D. 1974). When the jurisdiction of a tribunal such as this Commission exists only under certain conditions or depends upon a particular mode of application, the tribunal may not act until the required conditions occur or a party properly invokes its power. *State ex rel. Robinson v. Crouch*, 616 S.W.2d 587, 592 (Mo. App., S.D. 1981). “Failure to comply with statutory time for appeal in an administrative proceeding results in a lapse of jurisdiction and loss

of [the] right of appeal.” *Community Fed. Sav. & Loan Assoc. v. Director of Revenue*, 752 S.W.2d 794, 799 (Mo. banc 1988), *cert. denied*, 488 U.S. 893 (1988). We have no jurisdiction to hear a complaint filed outside the statutory time limit, *Springfield Park Cent. Hosp. v. Director of Revenue*, 643 S.W.2d 599, 600 (Mo. 1983), even if it is only one day late. Neither the Director nor this Commission has any power to change the law. *Lynn v. Director of Revenue*, 689 S.W.2d 45, 49 (Mo. banc 1985).

El Volcan’s response to the motion to dismiss raises several issues. Among other things, the response alleges that staff of the Director knew that the appeal had been misfiled with the Director’s Taxation Division, but chose not to file it with this Commission until a day after the deadline for such filing, and thus acted in bad faith. The response also alleges that El Volcan’s owner is not opposed to paying the correct amounts owed to the State but that, if forced to pay the amounts assessed by the Director, those amounts “are large enough to drive the restaurant out of existence.” The response finally asks us, “in light of the facts and circumstances of this case, and in the interest of justice,” that we not dismiss the case. These arguments are equitable ones. However, as an administrative agency, we have no authority to apply the doctrines of equity. *Soars v. Soars-Lovelace, Inc.*, 142 S.W.2d 866, 871 (Mo. 1940).

We grant the Director’s motion and dismiss the complaint for untimely appeal.

With respect to the deficiency in the collection of withholding tax by El Volcan, our jurisdiction does not arise until a protest is filed with the Director and the Director must issue a final decision on that protest. Sections 143.631.1 and 143.651; *State ex. rel. Fischer v. Brooks*, 150 S.W.3d 284, 284 (Mo. banc 2004) (describing the filing of a protest as the “exclusive remedy for challenging the assessment.”); *State ex rel. Fischer v. Sanders*, 80 S.W.3d 1 (Mo. App. W.D. 2002) (setting forth the protest as a necessary step in appealing a case to this Commission and then to a court).

### Deficiency of Withholding Tax

While it appears to us that El Volcan has now also timely filed a protest with the Director as to the notice of deficiency in the collection of withholdings, the Director has not yet issued any final decision on that protest. We have no jurisdiction over El Volcan's complaint as to the notice of withholding because the protest procedure governing the challenge to the withholding deficiency notices was not concluded. Likewise, this Commission has no jurisdiction over disposition of tax liens filed with the local recorder's office. If we have no jurisdiction to hear El Volcan's complaint as to those two issues, we cannot reach their merits in this case and can only exercise our inherent power to dismiss them. *Oberreiter v. Fullbright Trucking*, 24 S.W.3d 727, 729 (Mo. App. E.D. 2000).

### **Summary**

We grant the Director's motion to dismiss the complaint.

SO ORDERED on February 13, 2015.

\s\ Nicole Colbert-Botchway  
NICOLE COLBERT-BOTCHWAY  
Commissioner